Ngoi Thiam Woh v Maxwell, Kenion, Cowdy & Jones (sued as a firm) & Anor

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–894 OF 1999
KAMALANATHAN RATNAM J
5 JULY 2002

***Tort** — Defamation — Publication of proclamation of sale — Absence of conspiracy or fraud and negligence — Whether the first defendant defamed the plaintiff by causing the advertisement of the proclamation of sale — Whether the plaintiff could sustain an action in defamation against the defendants — Rules of the High Court 1980 O 31, O 33 r 2 and O 83*

The plaintiff borrowed a sum of money from the second defendant to pay the balance purchase price of one unit of a condotel and this sum was to be repaid by 156 monthly instalments. The plaintiff executed a deed of assignment as a security for the loan in favour of the second defendant. The plaintiff defaulted in his instalment payments and the first defendant, on instructions from the second defendant, issued a notice of demand dated 21 October 1997. Subsequently, the first defendant issued a notice of default dated 22 November 1997 demanding that the plaintiff make good the alleged default upon the expiry of seven days, failing which the second defendant would exercise its rights to sell the plaintiff's condotel. The defendants then on 9 January 1998 advertised in *The Star* newspaper a proclamation of sale of the said condotel. The plaintiff filed a suit in the High Court in Ipoh, Civil Suit No 22–24–98 against the second defendant and others to restrain the second defendant from selling the said unit until disposal of the case. Meanwhile, the first defendant filed an originating summons under O 31 of the Rules of the High Court 1980 ('the RHC') which they withdrew and filed a fresh originating summons under O 83 of the RHC. The second defendant filed another suit in the Ipoh High Court vide Civil Suit No 22–68–99 against the plaintiff to recover the loan sum together with interest. During case management, it was agreed that the court decide the case pursuant to O 33 r 2 of the RHC on two issues namely: (i) whether the first defendant, acting as solicitors for and on the instructions of the second defendant, defamed the plaintiff by causing the advertisement of the proclamation of sale dated 9 January 1998 and (ii) whether the plaintiff could sustain an action in defamation against the defendants upon the High Court in Ipoh having held in a civil suit filed by the second defendant against the plaintiff, that there was no conspiracy or fraud and negligence on the part of the second defendant.

Held, dismissing the suit with costs:

(1) In this case, there was an absolute assignment and the second defendant had an absolute right to proceed to advertise the proclamation of sale and to auction off the condotel without

applying for an order of the court. Since the second defendant had the absolute right to proceed with the proclamation of sale, the first defendant, who acted as solicitors and thus as agents of the second defendant, was clearly acting within the law when it caused the advertisement to appear in *The Star, Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513 followed (see p 347G–H).

(2) In Civil Suit No 22–68–99 filed by the present second defendant against the present plaintiff claiming the loan sum, whilst the trial judge dismissed the second defendant's claim, he however dismissed the present plaintiff's contention of misrepresentation, conspiracy, fraud and negligence against the second defendants and related companies. Since the plaintiff was not appealing the decision the finding of the trial judge must be accepted as correct (see pp 347H–348A).

[Bahasa Malaysia summary

Plaintif telah meminjam daripada defendan kedua satu jumlah wang untuk membayar baki harga belian sebuah unit condotel dan jumlah ini hendaklah dibayar balik melalui 156 ansuran bulanan. Plaintif telah menyempurnakan satu suratikatan penyerahhakan sebagai jaminan untuk pinjaman tersebut yang memihak kepada defendan kedua. Plaintif telah mengingkari bayaran-bayaran ansuran beliau dan defendan pertama, atas arahan-arahan daripada defendan kedua, telah mengeluarkan satu notis tuntutan bertarikh 21 Oktober 1997. Kemudiannya, defendan pertama telah mengeluarkan satu notis keingkaran bertarikh 22 November 1997 menuntut supaya plaintif memulihkan keingkaran yang didakwa itu selepas tamat tempoh tujuh hari, kegagalan yang mana menyebabkan defendan-defendan kedua melaksanakan hak mereka untuk menjual condotel plaintif. Defendan-defendan kemudiannya pada 9 Januari 1998 mengiklankan di dalam akhbar *The Star* satu pengisytiharan jualan akan condotel tersebut. Plaintif telah memfailkan satu guaman di dalam Mahkamah Tinggi di Ipoh, Guaman Sivil No 22–24–98 terhadap defendan kedua dan pihak-pihak lain untuk menghalang defendan kedua daripada menjual unit tersebut sehingga penyelesaian kes tersebut. Sementara itu, defendan pertama memfailkan satu saman pemula di bawah A 31 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT tersebut') yang mana telah mereka tarikh balik dan memfailkan satu saman pemula yang baru di bawah O 83 KMT. Defendan kedua telah memfailkan satu guaman yang lain dalam Mahkamah Tinggi Ipoh melalui Guaman Sivil No 22–68–99 terhadap plaintif untuk mendapatkan balik jumlah pinjaman tersebut bersama-sama faedah. Ketika pengurusan kes, telah dipersetujui bahawa Mahkamah memutuskan kes tersebut selaras dengan A 33 k 2 KMT atas dua isu iaitu: (i) sama ada defendan pertama, yang bertindak sebagai peguamcara untuk dan atas arahan-arahan defendan kedua, memfitnah plaintif dengan

menyebabkan iklan pengisytiharan jualan bertarikh 9 Januari 1998 dan (ii) sama ada plaintif boleh mempertahankan suatu tindakan memfitnah terhadap defendan-defendan setelah Mahkamah Tinggi di Ipoh memutuskan dalam guaman sivil yang difailkan oleh defendan kedua terhadap plaintif, bahawa tidak terdapat konspirasi atau fraud dan kecuaian oleh defendan kedua.

Diputuskan, menolak guaman tersebut dengan kos:

(1) Dalam kes ini terdapat penyerahhakan mutlak dan defendan kedua mempunyai hak mutlak untuk meneruskan bagi mengiklankan pengisytiharan jualan dan untuk melelongkan condotel tersebut tanpa memohon untuk mendapatkan perintah mahkamah. Oleh kerana defendan kedua mempunyai hak mutlak untuk meneruskan pengisytiharan jualan tersebut, defendan pertama, yang bertindak sebagai peguamcara dan oleh itu sebagai ejen defendan keluar, telah dengan jelasnya bertindak di dalam lingkungan undang-undang apabila ianya menyebabkan iklan tersebut dikeluarkan dalam akhbar *The Star*, *Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513 diikut (lihat ms 347G–H).

(2) Dalam Guaman Sivil No 22–68–99 yang telah difailkan oleh defendan kedua semasa terhadap plaintif semasa menuntut jumlah pinjaman tersebut, sementara hakim perbicaraan menolak tuntutan defendan kedua, beliau walaubagaimana pun menolak penegasan plaintif semasa mengenai salah-nyataan, konspirasi, fraud dan kecuaian terhadap defendan-defendan kedua dan syarikat-syarikat yang berkaitan. Oleh kerana plaintif tidak merayui keputusan tersebut, maka keputusan hakim perbicaraan mestilah diterima sebagai betul (lihat ms 347H–348A).]

Notes

For cases on defamation generally, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 193–409.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

MBF Finance Bhd v Ngoi Thiam Woh [2001] 7 CLJ 221 (refd)

Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor [2002] 2 MLJ 513 (folld)

Legislation referred to

National Land Code 1965 s 221

Rules of the High Court 1980 O 31, O 33 r 2, O 83

Ngan SH (*Ahmad Yani* with him) (*Abbas & Ngan*) for the plaintiff. A

Silvanathan (*Rathi Nair* with him) (*Kean Chye & Sivalingam*) for the first defendant.

Loh Yen Zin (*Jeyaratnam & Chong*) for the second defendant.

Kamalanathan Ratnam J: The plaintiff, the executive director of Eltean Incorporated Sdn Bhd with offices in Singapore, Jakarta, Manila and B Malaysia purchased a condotel unit in Penang from MBf Property Services Sdn Bhd. The second defendant, a licenced finance company, made available to the plaintiff a sum of RM232,650 to pay for the balance of the purchase price of the condotel to be repaid by 156 equal monthly instalments of RM2,383.62. The plaintiff executed a deed of assignment as security for the loan in favour of the second defendant. There was an C absolute assignment of the property from the plaintiff to the second defendant and according to cl 6.03 of the deed of assignment, the assignee, the second defendant, was given the power to enforce all rights and remedies under the sale and purchase agreement and to do all other things, including the right to sell by private treaty.

D

Upon the plaintiff's default in his instalment payments to the second defendant, the first defendant, a firm of solicitors practising in Ipoh and acting for the second defendant, issued, on instructions, a notice of demand dated 21 October 1997 to the plaintiff demanding a sum of RM9,949.88, being instalments due to the second defendant for the months of July to September 1997 together with penalty, interests and other costs. Receiving E no response, the first defendant sent another letter dated 22 November 1997 to the plaintiff enclosing a notice of default and demanding that the plaintiff make good the alleged default upon the expiry of seven days, failing which the second defendant would exercise its rights to sell the plaintiff's unit of condotel. On 1 December 1997, the first defendant sent a letter to the plaintiff containing a notice of termination pursuant to the deed of F assignment and requested that the plaintiff vacate the premises. The defendants then on 9 January 1998 advertised in *The Star* newspaper a proclamation of sale of the said condotel. It is necessary to reproduce the entire proclamation of sale which reads as follows:

G

PROCLAMATION OF SALE

Between

MBf Finance Bhd — Assignee/Lender

And H

Ngoi Thiam Woh — Assignor/Borrower

(NRIC No 530922-08-5273)

In the exercise of the rights and powers conferred upon the assignee/lender under a loan agreement cum deed of assignment, both dated 19 November 1994, between the assignor/borrower and the said assignee/lender with the assistance of the undermentioned auctioner. I

A

WILL SELL BY
PUBLIC AUCTION

On Friday 23 January 1998
At 11 in the morning
In the premises of No 117, First Floor
Bangunan Persatuan Melayu
B Jalan Macalister, 10400 Pulau Pinang

The subject property is a hotel suite known as No 4, on the 5th Floor of Sandy Bay Paradise Hotel, Jalan Tanjung Bungah, Penang.

Particulars of Title

C Title: No individual title

Floor Area: 70.14sq m (755sq ft)

Beneficial Owner: Ngoi Thiam Woh

Encumbrances: assigned to MBf Finance Bhd

D Location and description of the property: The subject property is a one bedroom hotel suite within Sandy Bay Paradise Hotel which is located on the north side of Jalan Tanjung Bungah at about 10 km north west of the city centre and 1 km east of Tanjung Bungah town. The subject property accommodates a living/dining area, a kitchen, a bedroom, a bath/wc and two balconies.

E Reserve Price:

The property will be sold subject to a reserve price of RM275,000 (Ringgit Malaysia: Two Hundred and Seventy Five Thousand only).

F All intending bidders are required to deposit with the auctioneer a sum equivalent to 10% of the reserve price by a bank draft in favour of Messrs Maxwell, Kenion, Cowdy & Jones before the auction sale. For further particulars, please apply to Messrs Maxwell, Kenion, Cowdy & Jones at Wisma Makencone, No 31, Jalan Tun Sambanthan, 30000 Ipoh, Perak Darul Ridzuan.

Tel: 05-2551225 or to the undermentioned auctioneer.

G 77-C Jalan Datuk Haji Eusoff,

Damai Complex, M Mogan

50400 Kuala Lumpur Licensed Auctioneer

H Tel: 03-4427528/Atur: 012-3374424 Or

SYARIKAT DAYA MAJU
No 117, 1st Floor, Bangunan Persekutuan Melayu, Jalan Macalister, 10400 Pulau Pinang
Tel: 04-2287270

I The plaintiff then filed a suit in the High Court at Ipoh, Civil Suit No 22–24–98, against the second defendant and others and obtained an injunction to restrain the second defendant from selling the said unit until the disposal of the case. In the meantime, the first defendant filed an Originating

Summons No 24–269–98 ('the OS') at the Penang High Court on behalf of the second defendant for an order of court under O 31 of the Rules of the High Court 1980 ('the RHC') to sell the plaintiff's condotel. The second defendant then withdrew the said OS and filed a fresh originating summons under O 83 of the RHC. In the meantime, the second defendant filed another suit in the Ipoh High Court vide Suit No 22–68–99 against the plaintiff to recover the loan sum together with interest amounting to RM262,100.47 still owing to the second defendant by the plaintiffs.

Case for the plaintiff

It is the plaintiff's case that by publishing the proclamation of sale, the defendants had disgraced him nationally and had subjected him to public scandal, odium and contempt. The plaintiff further claimed that by such a proclamation of sale, the defendants had caused to be conveyed and perceived by the reading public that the plaintiff was and still is not credit worthy, is a dishonourable person, is financially unsound, is likely to be made a bankrupt, is a person of low repute and is an unreliable businessman. He further contended that due to the said advertisement, he has been blacklisted by the bank and that his name has since appeared on the electronic data base. It is the plaintiff's case that the said advertisement was published contrary to law. The plaintiff prayed for:

(1) an injunction restraining the first and second defendants from further advertising and publishing the said proclamation of sale;

(2) aggravated damages in the sum of RM12,000,000;

(3) general damages;

(4) interests;

(5) costs; and

(6) such further relief as the court deems fit.

Case for the defendants

The first defendant's defence was that they had acted according to law as provided in the various sections in the deed of assignment. It was their case that the advertisement of the intended public auction was not only an action to protect the interests of the second defendant, but it was meant to ensure that sufficient potential buyers would tender the best offer so as to ensure the acquisition of the property at the best price for the benefit of the plaintiff as well as the second defendant. The first defendant denied that the words complained of bore any defamatory meaning on the plaintiff from the point of view of right thinking members of society. They also pleaded that the words complained of were true in substance and in fact and not defamatory as the plaintiff had failed to repay his instalments under the loan agreement and deed of assignment. The first defendant also relied on qualified privilege. The second defendant's defence was more or less similar to that of the first defendant's.

A *Findings of the court*

During case management, parties agreed that I decide the case pursuant to O 33 r 2 of the RHC which empowers this court to order any question or issue arising in a cause or matter whether of fact or law, or partly of fact and partly of law, to be tried before, at or after the trial of the cause or matter. B The first defendant then posed four questions to be answered by the court pursuant to O 33 r 2 of the RHC. Subsequently, parties by consent distilled the four questions to two. The two issues to be determined by the court based on affidavit evidence were as follows:

1 whether the first defendants acting as solicitors for the second C defendant on the instructions of the second defendant have defamed the plaintiff by causing the advertisement of the proclamation of sale dated 9 January 1998;

(2) whether the plaintiff can sustain an action in defamation against the defendants, upon the High Court at Ipoh (see *MBf Finance Bhd v Ngoi Thiam Woh* [2001] 7 CLJ 221) having held that there was no D conspiracy or fraud and negligence on the part of the second defendant.

There is no dispute that there is a loan agreement and that pursuant to the said loan agreement, the sum of RM232,650 was to be paid by 156 equal monthly instalments. There is also no dispute that the plaintiff had executed E a deed of assignment in favour of the second defendant. The question is, could the second defendant have instructed the first defendants to advertise the proclamation of sale. This issue has now been put to rest by the recent decision of the Federal Court in *Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513 wherein Abdul Malek Ahmad FCJ very succinctly summarized the view of the court when he said at p 530 F as follows:

> ... that in the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realize its security under an absolute assignment of rights to land, the court should give effect to and recognize the contractual rights as determined between the vendor and the G purchaser.

Since in the case before me too there was an absolute assignment, the second defendant had an absolute right to proceed to advertise the proclamation of sale and to auction off the condotel without applying for an order of court. Since the second defendant had the absolute right to proceed H with the proclamation of sale, the first defendant who acted as solicitors and thus as agents of the second defendant were clearly acting within the law when they caused the advertisement to appear in *The Star*.

In any case, in Civil Suit No 22–68–99 filed by the present second defendant against the present plaintiff claiming the loan sum, whilst the trial judge dismissed the second defendant's claim, he however dismissed the I present plaintiff's contention of misrepresentation, conspiracy, fraud and negligence against the second defendant and the related companies (see *MBf Finance Bhd*). Since En Ahmad Yani for the plaintiff confirmed that

there was no appeal from the decision in *MBf Finance Bhd* by his client, the finding of the learned trial judge must be accepted as correct. A

In the circumstances, this court answered both questions in the negative.

In the cause of his submission, En Ahmad Yani argued that the lease cum assignment agreement was contrary to s 221 of the National Land Code 1965. When I questioned En Ahmad Yani as to why he did not raise this issue before the learned trial judge in *MBf Finance Bhd* and whether he was not caught by the decision of the Federal Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 which held that parties are prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently, I was surprised by En Ahmad Yani's answer that the issue of fraud and conspiracy were 'not done exhaustively' before the trial judge in *MBf Finance Bhd*. At this stage, Mr Ngan, co-counsel for the plaintiff, continued with the submission by saying that only at a trial could the plaintiff show that he had been continuously harassed by the defendants. To my mind, this was no longer an issue because it was by consent that parties had agreed to submit the two questions to be answered by this court by agreeing to proceed pursuant to O 33 of the RHC. It was, therefore, too late in the day for Mr Ngan to backtrack and to ask for a trial. Besides, even if his client was indeed harassed, there was no reason why the plaintiff could not have averred details of such harassment, if any, in his affidavits. To a specific question as to why there were no affidavits to this effect, Mr Ngan conceded that he had no direct evidence but he would be able to prove harassment by calling witnesses. Again, the plaintiff failed to respond to the issue. Why could this witness not have filed an affidavit? B C D E

I, therefore, had no hesitation in answering both questions in the negative. I, therefore, dismissed the suit with costs. F

Suit dismissed with costs.

Reported by Chew Phye Aun

G

H

I